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In the Supreme Court of the United States

October Term, 1962

No. 782

STATE OF OREGON, acting by and through its State Forester, and KLAMATH FOREST PROTECTIVE ASSOCIATION, an Oregon non-profit corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT Y. THORNTON
Attorney General of the
State of Oregon
Counsel of Record for Petitioners
Supreme Court Building
Salem 10, Oregon

Of Counsel
THOMAS C. STACER
Assistant Attorney General
CLARENCE R. KRUGER
Assistant Attorney General
2600 State Street
Salem 10, Oregon

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In the Supreme Court of the United States

October Term, 1962

No. .....

STATE OF OREGON, acting by and through its State Forester, and KLAMATH FOREST PROTECTIVE ASSOCIATION, an Oregon non-profit corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 20, 1962.

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon is reported in 195 F.Supp. 276.[1] The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 308 F2d 568 (1962) and appears in Appendix A, infra, pages 9-12.

Petitioners were granted to and including January 31, 1963, in which to file this petition for writ of certiorari by order of

[1] The opinion of the District Court (Or.), 1961, is in the printed Transcript of Record (R. 49-52) filed herein under Rule 23.

Honorable W. O. Douglas, Associate Justice of the Supreme Court of the United States, dated December 17, 1962.

JURISDICTION

The judgment of the Court of Appeals, (R. 64), Appendix B, infra, page 13, was entered September 20, 1962.

Jurisdiction of this court is conferred under 28 U.S.C.A. § 1254(1).

QUESTION PRESENTED FOR REVIEW

May an action be brought against the United States under the Federal Tort Claims Act for the recovery of fire suppression costs incurred by the State of Oregon and Klamath Forest Protective Association due to a fire burning uncontrolled on forest lands in Oregon, which fire was negligently set and allowed to escape by the officials and employees of the United States?

STATUTES INVOLVED

Federal Statutes:

28 U.S.C.A. §§ 1346(b), and 2671 to 2680.

The pertinent federal laws are set forth in Appendix C, infra, pages 14-15.

Oregon Statutes:

The Oregon Forest Laws relating to the prevention and suppression of fire on forest lands in Oregon are set forth in Appendix D, infra, pages 16-18.

STATEMENT OF THE CASE

The United States Forest Service, an agency of the defendant United States of America, set fire to lands located in the vicinity of Bogus Creek area in the County of Siskiyou, State and Northern District of California (R. 13). The fire was set by the servants, agents and employees of the United States, while acting within the course and scope of their employment (R. 13).

The fire escaped and burned over an area of Northern California, and into forest lands in the State and District of Oregon.

The fire burned uncontrolled into the State of Oregon (R. 14); the United States failed to take action to prevent the spread of the fire (R. 14) in Oregon.

Klamath Forest Protective Association and the State of Oregon, the latter by and through its State Forester, incurred expenses in the sum of $26,999.41 in controlling and extinguishing that part of the fire which had burned uncontrolled into the State of Oregon (R. 12, 14).

The United States failed to exert an effort to suppress and extinguish the fire which burned on the lands in the State of Oregon. The fire burned over both private and federal lands in the State of Oregon. The federal lands were under the jurisdiction of the Department of the Interior of the United States, and are commonly referred to as "O. & C." lands or Bureau of Land Management lands; the private lands, in part, were owned by members of Klamath Forest Protective Association (R. 3-12).

On June 23, 1959, the original complaint was filed against the United States of America alleging negligence of defendant in the setting and control of Bogus Mountain Fire. By the complaint, under the aforementioned Federal Tort Claims Act, plaintiffs sought to recover the expenses incurred by them in fighting, controlling and extinguishing the fire on forest lands in the State of Oregon.

On November 29, 1960, the second amended complaint was filed (R. 15). The action was based upon Oregon law, with particular reference to ORS chapter 477, and 477.064 to 477.071; the District Court's jurisdiction was founded on 28 U.S.C.A. § 1346(b).

The defendant filed a motion for summary judgment (R. 15, 16); thereafter, on June 26, 1961, the district court denied the motion, but on its own initiative determined the court lacked jurisdiction and entered its order of dismissal of the second

amended complaint (R. 53-54). The court had prefaced its order by an opinion issued June 22, 1961 (R. 49-52). By its opinion the district court made reference to and in effect adopted the ruling of Judge Louis E. Goodman, United States District Court for the Northern District of California (Southern Division), entered on June 1, 1961, in the case entitled "People of the State of California, Plaintiff, vs. United States of America and First Doe to Twentieth Doe, both inclusive, Defendants" (R. 52), which case is also on petition for writ of certiorari in this court by the State of California (CCA, No. 17534).[2]

The order of the District Court for the District of Oregon was appealed to the United States Circuit Court of Appeals for the Ninth Circuit, which court, after hearing, affirmed the district court on September 20, 1962 (R. 64); see Appendix B, infra, page 13. Thereafter, plaintiffs State of Oregon and Klamath Forest Protective Association have sought review of the decision of the Circuit Court of Appeals by filing this petition for writ of certiorari and appear herein as petitioners.

REASONS FOR GRANTING WRIT

The Determination of the Question of Federal Law is Necessary and Important.

This case involves the Federal Tort Claims Act, its purpose and scope. Since 1860 there had been comment from the Chief Executive of the United States that such an Act be passed. It was not until 1946 that the Congress of the United States enacted such legislation. Previously to the enactment of the law, the tort claims against the United States were the subject matter of private assistance bills in Congress. Until 1946 the volume of private assistance bills was a continuous yearly increase. The Federal

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[2] The People of the State of California brought the action against the United States for the recovery of the costs of suppressing the same fire incurred by the forestry officials of California. The District Court for the Northern District of California (S. Div.) dismissed the action, and the dismissal, like the case at bar, was affirmed.

Tort Claims Act has now afforded claimants an opportunity to litigate claims sounding in tort against the United States,

The Federal Tort Claims Act is well drafted legislation. The Act is general in its coverage of allowable torts within its scope, but is specific in setting forth exceptions to the Act. Because of its general coverage, claimants have been successful in bringing numerous and sundry tort claims against the United States. The federal courts have strictly guarded the exceptions of the Act.

Petitioners assert that the present case is within the purview of the Federal Tort Claims Act. The case is obviously not within the exceptions of the Act, Appendix C, infra; pages 14-15. The instant case presents matters of first impression under the Federal Tort Claims Act insofar as a claim for fire suppression costs; however, the subject matter of the case falls by analogy within the ambit of previously allowed claims against the United States under the Act.

In this case on petition, the decision of the District Court and its affirmation by the Circuit Court of Appeals has had the effect of scrambling previous interpretations of the Federal Tort Claims Act by federal courts. It is now imperative that the law in this field be settled. Both the District Court and Circuit Court of Appeals, below, have held that the Act was not inclusive of a claim by petitioners for costs incurred by them in fighting and suppressing a forest fire which originated, assertedly, through the negligence of the officials, employees and persons of the United States. The uniqueness of the claim is due to its make-up of such costs without further reference to property.

The State of Oregon, acting by and through its State Forester and State Board of Forestry, and such of its legal representatives as petitioner Klamath Forest Protective Association, is charged with the duty under Oregon laws to fight, control and suppress raging and uncontrolled forest fires. Such was the duty of the petitioners in the present case, as the fire known as "Bogus Mountain Fire" burned uncontrolled over forest lands in Oregon.

Particularly is the duty imminent if proper action is not being taken by the originator of the fire or the landowner to suppress the fire: see Appendix E, infra, page 19.

The United States is owner of a vast acreage of forest land located within the exterior boundaries of Oregon. The land, during certain seasons of the year, is susceptible to fire. Bogus Mountain Fire originated on federal lands and burned over both federal and private lands. It is extremely important to the public interest that the people and officials of the State of Oregon be afforded a settled interpretation of the Federal Tort Claims Act on the question stated in the petition in this cause. It is important because the state officials, in the absence of action by the officials and employees of the United States, are required by Oregon law to fight and extinguish uncontrolled forest fires, such as Bogus Mountain Fire.

Reference is made to the Petition for Writ of Certiorari by the People of the State of California now from the United States Court of Appeals for the Ninth Circuit. The petition dramatically notes that Oregon is but one of twenty five states having fire laws requiring its officials to act on fires if proper action is not being taken by other persons: see Petition for Writ of Certiorari by the People of the State of California, Docket No. 666, in the Supreme Court of the United States, pages 6 to 11, with footnote 5. Therefore, the import of having the Federal Tort Claims Act duly interpreted in view of the question stated in this petition.

The Federal Tort Claims Act, in effect, makes the United States, as a private citizen would be in Oregon, liable for its torts under the Oregon Forest Laws. The Oregon laws, Appendix D, infra, pages 16-18, authorize the collection of fire-fighting costs from the owner of forest lands who shirks his duty under the Oregon laws. The Oregon cases are set forth in Appendix E of this petition, page 19; such substantiate the liability of the private citizen under the Oregon Forest Laws.

To follow the decision of the District Court as affirmed by the Circuit Court of Appeals is to deny the liability, specifically

the tort liability, of the federal government under such Oregon laws by again spreading the cloak of sovereign immunity over the negligent origin of Bogus Mountain Fire. The interpretation of the Federal Tort Claims Act, as made by the District Court and affirmed on appeal, is straying far away from the purpose and intent of the federal Act. Since 1946 the decisions of federal courts have shown a progressive trend to amplify the full scope of the Act, to provide relief to persons damaged or injured because of the tortious acts of the officials and employees of the federal government, not to deny the claimant relief by requiring him to again revert to public assistance under congressional enactment.

It is common knowledge, if not judicial knowledge, that the representatives of the office of the Attorney General of the United States have included fire suppression costs as a part of settlements. The Attorney General pretends that damage to realty confers authority to include the suppression costs. Judicially noted, the Attorney General has made private settlements of federal litigation concerning Bogus Mountain Fire, and such included liberal settlement for fire costs incurred by the private claimant. The very facts of the origin of Bogus Mountain Fire by the United States have been the basis of settling federal tort liability for fire suppression costs. Thus, the importance of a review of the Federal Tort Claims Act as requested by this petition. Discrimination by federal officials through settlement procedures will either be thwarted, or will be affirmed. Claimants under the Federal Tort Claims Act are entitled to the requested interpretation of the Act. The law must be clarified from the scrambled arena into which it was placed by the courts below.

Although federal courts have given the Federal Tort Claims Act a literal and narrow construction, yet there have been an equal number of courts that have avowed that the Act should receive a liberal construction because of its benevolent purposes:

Bates v. United States, 76 F. Supp. 57; *Panella v. United States*, 216 Fed. 2d 622.

As has been revealed above, there are exceptions to actions which may be brought against the United States: 28 U.S.C.A. Sec. 2680. However, the present action is within the scope of the Federal Tort Claims Act, as the negligence and carelessness of the officials and employees of the United States was the proximate cause of the damages sustained by the petitioners, namely, $26,999.41 expended by the petitioners in fighting, controlling and extinguishing Bogus Mountain Fire on forest lands in Oregon.

Judicially, the court may note that fires on forest lands occur year after year during those periods of hot and dry weather. The United States owns and has jurisdiction over millions of acres of forest land in Oregon. Should the officials and employees of the federal government fail to take proper action of raging forest fires burning uncontrolled on such lands, then Oregon law demands the officials of the state to fight and extinguish the fires. Are not the fire suppression costs incurred by Oregon officials within the perview of the Federal Tort Claims Act? It is important that the law in this field be clarified and made more certain.

CONCLUSION

It is urged that the petition be granted for the foregoing reasons.

Respectfully submitted,

ROBERT Y. THORNTON
Attorney General of the
State of Oregon
Counsel of Record for Petitioners

Of Counsel
THOMAS C. STACER
CLARENCE R. KRUGER
Assistant Attorneys General

APPENDIX A

Opinion of the Court Below

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF OREGON, acting by and through its State Forester, and KLAMATH FOREST PROTECTIVE ASSOCIATION, an Oregon nonprofit corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 17,574

Sept. 20, 1962

On Appeal from the United States District Court for the District of Oregon

Before: BARNES and HAMLIN, Circuit Judges, and HODGE, District Judge

HODGE, District Judge:

Except as herein noted, the appeal in this case involves identical issues with those decided by the court in *People of the State of California v. United States*, No. 17,534, opinion filed September 20, 1962 (..... F. 2d .....).

The complaint, founded upon the Tort Claims Act, Section 1346(b), Title 28 U.S.C.A., alleges that agents and employees of the Forest Service, Department of Agriculture, United States of America, while acting within the scope of their employment, negligently and carelessly set a forest fire on lands of the United States, which fire they negligently and carelessly permitted to escape and burn "into the State and District of Oregon," as a proximate result of which negligence the plaintiffs were required to fight, control and extinguish said fire and expended the sum of $26,999.41 for such purpose, which sum they seek to recover against the United States.

Appellee filed a motion for summary judgment, on the grounds that the second amended complaint does not state a claim for which relief can be granted and that the court lacks jurisdiction of the subject matter of the action. The District Court found that a motion for summary judgment was not the proper manner in which to raise the question of the court's jurisdiction and denied such motion, but held that since the jurisdiction of the court had been invoked, an order of dismissal should be entered for the reason that the district courts have exclusive jurisdiction of civil actions on claims against the United States for money damages "for injury or loss of property" caused by the negligent or wrongful act or omission of any employee of the Government and that no such injury or loss of property was claimed. From the order of dismissal appellants appeal.

The appellants' action is also based upon the provisions of the Oregon statute, being Oregon Revised Statues, Sections 477.002 to 477.071, declaring an uncontrolled fire on any forest land in Oregon to be a public nuisance which may be summarily abated and providing, as in the State of California statute, that where the owner, operator or person in possession is negligent in the origin of the fire, "the actual cost of controlling or extinguishing the fire shall be recovered from such owner, operator or person in possession . . . by action for debt prosecuted in the name of the State of Oregon, or such forest protective agency or both." The statute also provides that the cost in such cases shall constitute a general lien upon the real and personal property of such owner, operator or person in possession, provides for the filing of notice of such lien in the office of the County Clerk of the county in which the lands are situated within six months after extinguishment of the fire, and that such lien may be foreclosed by suit in the manner provided by law for foreclosure of liens for labor and material; and that upon request of the Forester the District Attorney for the district in which the lands and personal property are situated "shall prosecute such action for debt or foreclose the lien in the name

of the State of Oregon or such forest protective agency, or both."

This statute creates the same remedy as the State of California statute except for the provision for lien. It is contended by appellants, for the first time on appeal, that this lien gives to the State a sufficient interest in the lands involved to maintain the action in tort. We do not agree, for regardless of any lien, the complaint does not contain the essential element of an action under the Tort Claims Act that the action must be for money or damages "for injury or loss of property" and no such injury or loss of appellants' property is claimed in the complaint.

Appellants also assert that the action is in tort as decided by the Supreme Court of Oregon, citing *State v. City of Marshfield*, 259 Pac. 201, *State v. Gourley Bros. et al.*, 305 P. 2d 396, and *State v. the California-Oregon Power Co.*, 358 P. 2d 524. The last two cited cases do not so hold. The case of *State v. City of Marshfield*, in applying a prior statute granting relief for the expenses in fighting a fire by an action "for debt" holds that the reasonable cost of fighting fire on defendant's land is based upon failure to exercise reasonable diligence by the City and was a tort and that the City must respond for that "which is the direct, natural and proximate result thereof." But whatever label the State of Oregon may place upon the statute does not confer jurisdiction on the district court under the Tort Claims Act for expenses incurred by a State or other agency in fighting the fire where no injury or loss of property is claimed, as the jurisdiction of the court under the Tort Claims Act is limited to claims for property damage and personal injury or death. See also *Anno. 1. A.L.R. 2d 225.*

Appellants also claim that the expenses involved the protection of the State's natural resources, which question we have disposed of in the State of California case.

For the reasons assigned in *People of the State of California v. United States* and for the further reasons assigned herein the order of the District Court is affirmed.

(Endorsed) Opinion Filed September 20, 1962.

Frank H. Schmid, Clerk.

APPENDIX B

Judgment of the Court Below

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF OREGON, ETC.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 17,574
JUDGMENT

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

Filed and entered SEPTEMBER 20, 1962.

APPENDIX C

Pertinent Federal Statutory Provisions

28 U.S.C.A. § 1346(b)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 2680

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or exercise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections

741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives. As amended Sept. 26, 1950, c. 1049, §§ 2(a) (2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub. L. 86-168, Title II, § 202(b), 73 Stat. 389.

APPENDIX D

Oregon Forest Laws relating to the prevention and suppression of fire on forest lands in Oregon.

ORS 477.002 (1) (d) "Forest land" includes any forest, woodland, brushland, cutover land, slashing, chopping or clearing containing any inflammable forest debris.

ORS 477.064 Any fire on any forest land in Oregon burning uncontrolled or without proper action being taken to prevent its spread, notwithstanding its origin, is declared a public nuisance by reason of its menace to life and property. The spread of fire in forest land across an ownership boundary is prima facie evidence of fire burning uncontrolled.

ORS 477.066 The owner, operator and person in possession of land on which a fire exists, or from which it may have spread, or any of them, notwithstanding the origin or subsequent spread thereof on his own or other land, shall make every reasonable effort to control and extinguish such fire immediately when its existence comes to his knowledge, without awaiting instructions from the forester, warden or ranger and shall continue until the fire is extinguished. If the owner or operator or person in possession fails so to do, or if the fire is burning uncontrolled, the forester, or any forest protective agency under contract with the State Board of Forestry for the protection of forest land against fire, and within whose protection area the fire exists, shall summarily abate the nuisance thus constituted by controlling and extinguishing the fire.

ORS 477.068 (1) In case such owner, operator and person in possession, or any of them, shall fail to make the effort required by ORS 477.066, or where such owner, operator or person in possession is wilful, malicious or negligent in the origin of the fire, the actual cost of controlling or extinguishing the fire shall be recovered from such owner, operator or person in possession when necessary by action for debt prosecuted in the name of the

State of Oregon or such forest protective agency or both.

(2) The cost in cases covered by ORS 477.066 shall constitute a general lien upon the real and personal property of such owner, operator or person in possession, but the lien shall be limited to the real and personal property situated within the external boundaries of the area over which the fire has burned. A written statement and notice of the lien, containing a description of the property and a statement of the cost, shall be certified under oath by the forester or any warden and filed in the office of the county clerk of the county in which the lands and personal property are situated within six months after extinguishment of the fire, and may be foreclosed by suit in the manner provided by law for forclosure of liens, for labor and material. The lien provided for in this section shall be inferior to any existing lien.

(3) Upon request of the forester, the district attorney for the district in which the lands and personal property are situated shall prosecute such action for debt or foreclose the lien in the name of the State of Oregon or such forest protective agency or both. Liens provided for in this section shall cease to exist unless suit for foreclosure is instituted within six months from the date of filing the same.

ORS 477.069 Notwithstanding ORS 16.220 and 16.230, or any other law, in the instance of a fire occurring as described in ORS 477.064, or any other fire or spot fire therefrom, wherein the owner, operator or person in possession, or any of them, has been wilful, malicious or negligent in the origin of the fire and also has failed to make the effort required by ORS 477.066, the plaintiff, in bringing the action authorized by ORS 477.068, may unite in the same complaint such causes permitting collection of the cost incurred by the plaintiff under ORS 477.066. The provisions of this section shall not apply to any acts, omissions, actions, suits or proceedings occurring or commenced prior to April 19, 1957.

ORS 477.070 If the owner regularly pays a fire patrol assessment on the lands described under ORS 477.068 or is a member in good standing of an organization approved by and under contract with the board, which organization has undertaken the control and suppression of fires on such land and which is actually engaged in the control and suppression of fire entering upon or burning on such land, the owner, operator or person in possession shall not be subject to the penalties prescribed by ORS 164.070, or be held as maintaining a nuisance as defined in ORS 477.064, unless he or his agent is wilful, malicious or negligent in the origin of the fire. But payment of fire patrol assessments or membership in an organization under contract with the board shall not relieve any owner, operator or person in possession of land from the obligation imposed by ORS 477.066 and 477.068 to control and prevent the spread of fires if that land has theretofore become an operation area and if, as a result thereof, an additional fire hazard has been created and exists thereon and has not been released by the forester.

ORS 477.071 For the purpose of ORS 477.066, notification to the owner, operator and person in possession of the land, or any of them, shall be considered good and sufficient notice to the owner of the existence of a fire.

APPENDIX E

Bates v. United States, 76 F. Supp. 57.

First State Bank v. Kendall, 107 Or 1, 213 P 142.

Panella v. United States, 216 Fed. 2d 622.

People of the State of California vs. United States of America, 195 F. Supp 793; 307 F2d 941 (1962).

State v. City of Marshfield, 122 Or. 323, 259 P 201.

State v. Gourley Bros. et al, 209 Or 363, 305 P2d 396, 306 P2d 1117.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 782

STATE OF OREGON, ACTING BY AND THROUGH ITS STATE FORESTER, AND KLAMATH FOREST PROTECTIVE ASSOCIATION, AN OREGON NON-PROFIT CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Oregon (R. 49–52)[1] is reported at 195 F. Supp. 276. The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. 9–12) is reported at 308 F. 2d 568.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13) was entered on September 20, 1962. On Decem-

[1] Record references are to the printed Transcript of Record in the court of appeals, filed in this Court by petitioners.

ber 19, 1962, by order of Mr. Justice Douglas, the time for filing a petition for a writ of certiorari was extended to January 31, 1963, and the petition was filed on that date.

QUESTION PRESENTED

Whether the claim of a State to recover costs incurred in suppressing a fire which was started by federal employees and, through their alleged negligence, was allowed to spread beyond federal property, is cognizable under the Federal Tort Claims Act.

STATUTES INVOLVED

The Judicial Code, 28 U.S.C. 1346, provides in relevant part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accru-

ing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

The Oregon Revised Statutes provide in relevant part:

477.066. *Duty of owner or possessor of land to abate fire; abatement by authorities.* The owner, operator and person in possession of land on which a fire exists, or from which it may have spread, or any of them, notwithstanding the origin or subsequent spread thereof on his own or other land, shall make every reasonable effort to control and extinguish such fire immediately when its existence comes to his knowledge, without awaiting instructions from the forester, warden or ranger and shall continue until the fire is extinguished. If the owner or operator or person in possession fails so to do, or if the fire is burning uncontrolled, the forester, or any forest protective agency under the contract with the State Board of Forestry for the protection of forest land against fire and within whose protection area the fire exists, shall summarily abate the nuisance thus constituted by controlling and extinguishing the fire.

477.068. *Liability of owner or possessor for cost of abatement; lien; foreclosure.* (1) In

case such owner, operator and person in possession, or any of them, shall fail to make the effort required by ORS 477.066, or where such owner, operator or person in possession is wilful, malicious or negligent in the origin of the fire, the actual cost of controlling or extinguishing the fire shall be recovered from such owner, operator or person in possession when necessary by action for debt prosecuted in the name of the State of Oregon or such forest protective agency or both.

(2) The cost in cases covered by ORS 477.066 shall constitute a general lien upon the real and personal property of such owner, operator or person in possession, but the lien shall be limited to the real and personal property situated within the external boundaries of the area over which the fire has burned. A written statement and notice of the lien, containing a description of the property and a statement of the cost, shall be certified under oath by the forester or any warden and filed in the office of the county clerk of the county in which the lands and personal property are situated within six months after extinguishment of the fire, and may be foreclosed by suit in the manner provided by law for foreclosure of liens, for labor and material. The lien provided for in this section shall be inferior to any existing lien.

(3) Upon request of the forester, the district attorney for the district in which the lands and personal property are situated shall prosecute such action for debt or foreclose the lien in the name of the State of Oregon or such forest protective agency or both. Liens pro-

vided for in this section shall cease to exist unless suit for foreclosure is instituted within six months from the date of filing the same.

STATEMENT

This action was instituted by petitioners, the State of Oregon and the Klamath Forest Protective Association, under the Federal Tort Claims Act, 28 U.S.C. 1346(b), and arises out of a forest fire which occurred in 1957 (R. 13–15). On or about September 24, 1957, pursuant to a project of reforestation of its lands in the State of California, members of the Forest Service, United States Department of Agriculture, set a fire on those California lands (R. 13). This fire went out of control, crossed into Oregon, and burned lands in Oregon owned by the United States and private landowners (R. 14). Alleging negligence by the members of the Forest Service both in the setting and in losing control of the fire, petitioners sought to recover $26,999.41, "being moneys expended by plaintiffs to fight, control and extinguish said fire on forest lands in the State of Oregon" (R. 14).

The United States moved for summary judgment on the grounds that the complaint did not state a claim upon which relief could be granted and that the district court lacked jurisdiction over the subject matter (R. 16). The district court dismissed the complaint, holding that the Federal Tort Claims Act gave a right of action only where there was injury or loss of property, and that (R. 51): "It does not appear from the entire record now presented that either the State of Oregon or the Klamath Forest Protective

Association had any legal or equitable interest in the Oregon lands affected by the alleged escape of the fire. The claim asserted is solely for the recovery of costs incurred in fighting the forest fire, and not for any damage to property." On appeal, the Court of Appeals for the Ninth Circuit affirmed, agreeing that the claim was not within the Tort Claims Act because "no injury or loss of property is claimed" (Pet. App. 11).[2]

ARGUMENT

The decision below was based upon the same ground as the decision in *State of California* v. *United States of America*, No. 666, this Term, *i.e.*, that expenses incurred as public firemen, wholly unrelated to any damage to petitioners' property, are not recoverable under the Federal Tort Claims Act. For the reasons set forth in the United States' brief in opposition in the *California* case, it is submitted that the holding of the court of appeals that petitioners' claim is not within the ambit of the Federal Tort Claims Act is clearly correct and presents no conflict with other decisions warranting review by this Court.

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[2] As pointed out by the petitioners (Pet. 4, n. 2), the State of California brought an action against the United States under the Tort Claims Act for recovery of its costs of suppressing in California the same fire that was involved in the instant case. The District Court for the Northern District of California dismissed that action on the same ground—that no injury or loss of property was claimed—and the dismissal was likewise affirmed by the Court of Appeals for the Ninth Circuit, 307 F. 2d 941. A petition for a writ of certiorari and the government's opposition thereto have already been filed in this Court in the *California* case, No. 666, and is awaiting action by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
JOHN W. DOUGLAS,
Acting Assistant Attorney General.
ALAN S. ROSENTHAL,
JOHN C. ELDRIDGE,
Attorneys.

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